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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 517

THE SIROCCO COMPANY,

Petitioner,

v.

THE CITY OF MIAMI.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, AND BRIEF IN SUPPORT THEREOF.

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

THE SIROCCO COMPANY,
Petitioner,

v.

THE CITY OF MIAMI.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Sirocco Company, by its counsel, Sol A. Rosenblatt, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled cause April 1, 1941 (R. 86, 87) affirming the decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County (R. 79). Petitioner's petition for rehearing was denied May 9, 1941 (R. 90).

Questions Presented.

1. Whether lands were Public Lands within the meaning of Act of July 26, 1866 (c. 262, §8, 14 Stat. 253, 43 U. S. C., §932), in 1926 and 1927, where prior

thereto a valid homestead entry was made and final Certificate issued thereon, payment made and retained, and said entry was then erroneously cancelled, where after 1927 the Department of the Interior ordered said entry reinstated and ordered patent issued and on motion for rehearing by petitioner's predecessor in title gave said predecessor a preference right to perfect title and issued patent thereon?

2. Whether petitioner is entitled to compensation from respondent and to a lien on certain lands for such compensation, where petitioner is holder and owner of the following titles and equities to said lands: (1) rights of homestead entryman to whom final Certificate was validly issued and entry thereafter erroneously cancelled; (2) rights of holder of tax deed after sale on account of nonpayment of state and county taxes; (3) rights of supposed patentee whose patent was for many years considered to cover lands in question and which caused erroneous cancellation of homestead entry referred to in "(1)" above but which did not cover said lands; where petitioner and its predecessors in title were in continuous physical possession of said lands for seven and one-half years prior to appropriation and expended large sums to improve said land, and state, city and county taxes were assessed against said land during said period, where respondent then appropriated said land for two highways without compensation and where the Department of the Interior thereafter ordered said erroneously cancelled homestead entry reinstated and ordered patent issued thereon and on rehearing granted at request of petitioner's immediate predecessor in title, gave said predecessor preference right to perfect title to said lands and patent issued thereon?

Statutes Involved.

"Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres" (Act of March 3, 1891, c. 561, §5, 26 Stat. 1097, 43 U. S. C., §161).

"* * * after the lapse of two years from the date of the issuance of the register's receipt upon the final entry of any tract of land under the homestead or desert land laws, or under this section, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor" (Act of March 3, 1891, c. 561, §7, 26 Stat. 1098, 43 U. S. C., §165).

"The right of way for the construction of highways over public lands, not reserved for public

uses, is hereby granted" (Act of July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C., §932).

"No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner or first secured to him by deposit of money * * *" (Art. XVI, Sec. 29, Constitution of Florida).

Statement of Facts.

On December 31, 1935 petitioner, the plaintiff below, filed its original bill of complaint (R. 1).

On June 24, 1939 petitioner filed an amendment to its amended bill of complaint (R. 1). On September 20, 1939 the last mentioned bill of complaint was dismissed unless petitioner should file a further amended bill (R. 56, 57).

On October 9, 1939 petitioner filed an amended bill of complaint, which is the bill of complaint herein involved (R. 57). In and by said bill of complaint (R. 63) Exhibits 1 (R. 2-24), 2 (R. 24-33), 3 (R. 33-51), 4 (R. 52-53) and 5 (R. 53-54), which were attached to petitioner's bill of complaint filed June 24, 1939, were made part thereof by reference thereto.

This complaint (R. 57-76) and the exhibits incorporated in it by reference (R. 2-54) was dismissed with prejudice (R. 79). No reasons were assigned for such dismissal. The dismissal was affirmed without reasons assigned (R. 86) and the rehearing petition denied (R. 90).

The bill of complaint and its exhibits allege the following facts which must be deemed admitted:

Petitioners derive their title to the land in question (two strips of land on Government Lot 2, plat of 1875, of Section 19, Township 53 South, Range 42 E.,

Dade County Florida) (R. 57) through various intermediate deeds (R. 58-61, 66-68, 72-73) from William H. Gleason, from Edward C. Pent and from Frank White (R. 58-59).

A patent was issued to William H. Gleason in 1878 covering *inter alia* Lot 2 of the Section in question according to the plat of *1845* (R. 59).

Edward C. Pent duly filed a homestead entry in 1890 covering *inter alia* Lot 2 of the Section in question according to the plat of *1875* (R. 59). In 1891 Final Commutation Receipt and Certificate executed by the Receiver of the Local Land Office in favor of Pent, showing payment in full of commutation price for the land in question was duly filed and recorded (R. 59-60).

On April 19, 1892 Pent's Cash Certificate and homestead entry were cancelled for conflict with the rights of William H. Gleason (R. 20, 25). The purchase money was not returned (R. 20, 25). *Gleason* v. *Pent*, 14 L. D. 375 (R. 25).

In 1895 a tax deed was issued from the State of Florida to Frank White covering the land in question for nonpayment of taxes for the year 1893 (R. 60).

In *Gleason* v. *White*, 199 U. S. 54 (which did not involve Frank White or his title), decided in 1905, this Court held that Gleason had no title to the lands in question under his patent, as lot 2 of the plat of *1845* did not cover any part of Lot 2 of the plat of *1875* (R. 26). There were dicta to the effect that the lands were public lands but the only question before the court was whether they were public lands as against Gleason. The Pent entry was not mentioned and neither Pent nor his successors in title were parties to the action.

In 1920 Henry T. Read attempted to select the land in question under the exchange provisions of the Act of June 4, 1897 (c. 2, §1, 30 Stat. 36) in lieu of certain lands in South Dakota within the limits of a national forest (R. 25).

In the same year the State of Florida attempted to make a swamp land selection of the same land (R. 25) (Act of Sept. 28, 1850, c. 84, §§1, 4, 9 Stat. 519, 520; Act of March 12, 1860, c. 5, §1, 12 Stat. 3, 43 U. S. C., §982) and an indemnity school selection (R. 25) (Act of Feb. 28, 1891, c. 384, 26 Stat. 796, 43 U. S. C., §§851, 852).

Francis S. Whitten, then holder of the rights of Gleason, Pent and White, protested the selection of Read (R. 25). The General Land Office rejected the claims of the State of Florida and of Read as in conflict with Gleason's rights (R. 25-26). The Department of the Interior affirmed the decisions of the land office in *Whitten, et al.* v. *Read*, 49 L. D. 253, 49 L. D. 260, 50 L. D. 10 (R. 26). These decisions were based upon the decisions which had originally cancelled Pent's entry, *Gleason* v. *Pent*, 14 L. D. 375, 15 L. D. 286; *Lewis W. Pierce*, 18 L. D. 328. A supplemental patent was ordered issued to Gleason to end the controversy (R. 26).

Based upon the decision of this court in *Gleason* v. *White*, 199 U. S. 54, which had held that Gleason had no rights in the land, Read obtained an injunction in the District Court of the District of Columbia which was sustained by the Court of Appeals of the District of Columbia on December 7, 1925 (*Work et al.* v. *Read*, 10 F. (2d) 637, 23 F. (2d) 139) restraining the issuance of a patent to Gleason or his representatives (R. 26).

The Solicitor General construed the order to mean that all claims or rights could be considered by the Department of the Interior excluding those based on Gleason's entry and patent (R. 26, 27).

Thereafter, hearings were held at which Read, the State of Florida and Whitten appeared (R. 28, 41, 63). The Local Register took testimony directed to the following questions:

> 1. Were the tracts shown on the plat of 1875 as lots 1 and 2 of said Sec. 19, or either of them of such character on September 28, 1850, as to pass title thereto to the State of Florida under the swamp-land grant? Who is now possessed of the rights of the State of Florida, if any, under the swamp-land grant?
>
> 2. Who is now possessed of Pent's rights, if any, under the commuted homestead entry?
>
> 3. Were these lots vacant land subject to homestead entry on June 19, 1920, the date the Read application was filed?
>
> 4. Is Whitten or his assigns entitled to a preferred right to make entry for lot 2? Is Whitten or his assigns (as to the north part) and Deering or his assigns (as to the south part) entitled to a preferred right to make entry for lot 1? (R. 3, 27-28, 62-63).

The decision of the Commissioner on appeal was that,

> "1. * * * Lot 2 as shown on this plat (1875) was not of such character to pass to the State of Florida under the swamp land grant * * *" (R. 32).

"2. The Sirocco Company, successor in interest of Francis S. Whitten is now possessed of the greater part of Pent's rights under the commuted homestead entry for lot 2" (R. 33).

"3. Lots * * * 2 were not vacant land subject to homestead entry on June 19, 1920 * * *" R. 33).

"4. Whitten and his assigns are entitled to a Preferred right to make entry for lot 2" (R. 33).

On appeal to the Department of the Interior (*Whitten et al.* v. *Read,* 53 L. D. 453, decided August 11, 1931), it was held that the original action of the Land Department in cancelling Pent's entry was unsupported by the law and the facts (R. 51) and that Pent's title to the lands, acquired by his entry, was such as to prevent further disposal of them by the Government to any one other than Pent (R. 51). As modified by this holding the decision of the Commissioner was affirmed and Pent's cancelled entry was ordered reinstated and patent issued (R. 51, 63, 64).

After the decision became final as to all parties (R. 52), Whitten asked for a preference right to purchase Lot 2 (R. 52). This request was granted (R. 53) and, modified to agree with this request, the decision was adhered to (R. 53, 64-65). *Whitten et al.* v. *Read,* 53 L. D. 469.

Meanwhile, and during the years 1926 and 1927, after Whitten had been making extensive improvements on the lands (R. 4-8, 11-13, 17, 30, 31, 61), respondent appropriated two strips of land on Lot 2, described in the Record (R. 68, 70-71) for two streets and has continuously operated said tracts as streets

since that time (R. 69, 71). These two streets are main arteries of travel known as Biscayne Boulevard and the Federal Highway, and could not be blocked off by petitioner (R. 74).

No compensation was paid to petitioner or its predecessor in title (R. 74) though demand was made (R. 74). The value of the tracts appropriated was $750,000 (R. 74).

The bill alleges rights in petitioner under the Homestead Laws of the United States pursuant to the Pent entry (R. 58, 59, 63-66 *et passim*), the Whitten patent (R. 65) and the White tax deed (R. 58, 60, 66 *et passim*), and alleges that the respondent had no rights under the highway grant of the Homestead Laws (Act of July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C. §932) (R. 70, 72) and that the lands were not public land within the meaning of that law (R. 66).

The bill of complaint prays for a determination of the time of the respondent's appropriation (R. 75), the value of the land appropriated (R. 75), for a decree declaring that said value with interest be secured by a lien against the property (R. 75), for a decree directing the respondent to pay said sum to petitioner (R. 75-76), or that the land be sold to insure such payment (R. 76), and for other relief (R. 76).

Rulings of the Court Below.

The Circuit Court of the Eleventh Circuit of the State of Florida dismissed the bill of complaint herein without opinion and decreed that petitioner, having been offered leave by the Court to amend the said bill of complaint, and having refused to do so, said complaint, the cause of action and the case were dis-

missed out of court with prejudice (R. 79). The Supreme Court of Florida affirmed, merely stating that it seemed to the Court that there was no error in the decree (R. 86-87).

Previously, (*City of Miami* v. *The Sirocco Company*, 137 Fla. 434, 188 So. 344, set forth in the Appendix hereto) the Supreme Court of Florida had dismissed a former complaint upon the sole ground that the record did not disclose the source of the title of Wayne Realty & Investment Company, Whitten's predecessor in title (p. 436). The Court said that if Whitten had been a homestead entryman in regular course, there would be no question of petitioner's right to recover. The complaint herein involved cured that defect by showing title through Pent, a regular homestead entryman, but the opinion of the Supreme Court of Florida contains absolutely no word to indicate that any consideration was given to the Pent entry.

Reasons for Granting the Petition.

1. The Supreme Court of the State of Florida while assigning no reasons for its decree, necessarily held that the lands in question on which a valid entry had been made and erroneously cancelled were public lands when appropriated for a highway by the respondent.

The decision of this Court in *Cornelius* v. *Kessel*, 128 U. S. 456, held that the erroneous cancellation of a homestead entry did not impair the rights of the entryman or those claiming under him and that they could stand upon the original entry and were not obliged to invoke the subsequent reinstatement of the entry. The decision of the state court is in conflict with that applicable decision of this Court.

The Federal question involved is substantial since the decision of the Florida court opens the way to the appropriation without compensation of all lands upon which valid entry has been made if said entry has been cancelled through inadvertence or through clerical or legal mistake so long as no patent has been issued prior to the appropriation.

2. The Supreme Court of the State of Florida while assigning no reasons for its decree, necessarily held that the lands in question were public lands when appropriated for a highway by the respondent even though petitioner's predecessors in title held a tax deed to said land on account of nonpayment of taxes assessed after a valid entry had been made on said land and erroneously cancelled.

The decisions of this Court in *Carroll* v. *Safford*, 44 U. S., 3 How. 440, and *Witherspoon* v. *Duncan*, 71 U. S., 4 Wall. 220, held that lands upon which a valid entry had been made were subject to state taxation though patent had not yet issued and that a purchaser at a tax sale acquired a good equitable title to such lands.

The decision of the Florida court is in conflict with those applicable decisions of this Court.

For these reasons it is respectfully submitted that this petition should be granted.

THE SIROCCO COMPANY,
By SOL A. ROSENBLATT,
Counsel for Petitioner.

State of New York,
City of New York,
County of New York—ss.:

SOL A. ROSENBLATT, being duly sworn, deposes and says that he is the counsel for The Sirocco Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by The Sirocco Company is because the said petitioner is a Florida corporation, and deponent is its counsel.

SOL A. ROSENBLATT.

Sworn to before me this
14 day of August, 1941.

ROBERT A. PAPE,
Notary Public,
Kings County.
Certificate filed in New York County.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

THE SIROCCO COMPANY,
Petitioner,

—against—

THE CITY OF MIAMI.

BRIEF IN SUPPORT OF PETITION.

Opinions.

No opinion was delivered by the Circuit Court of the Eleventh Circuit of the State of Florida. The opinion of the Supreme Court of the State of Florida was filed April 1, 1941 and appears at page 86 of the Record. The opinion of the Supreme Court of Florida on the previous appeal in the same case (*City of Miami* v. *The Sirocco Company*) is reported in 137 Fla. 434, 188 So. 344, and is set forth in the Appendix hereto. That appeal involved a *different* complaint from the one herein involved.

Jurisdiction.

The jurisdiction of this Court is invoked under §237(b) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 937, 28 U. S. C. §344(b)).

The judgment of the Supreme Court of Florida, which is the highest court of the State, was entered April 1, 1941 (R. 86-87). Petition for rehearing was denied May 9, 1941 (R. 90). Extension of thirty days for filing petition for certiorari was granted by Mr. Justice Black on July 19, 1941. The petition was filed August 15, 1941.

In the bill of complaint and petition for rehearing rights under the homestead laws were alleged to be in petitioner (R. 58, 59, 63-66, 88-90, *et passim*). (Act March 3, 1891, c. 561, §§5-7, 26 Stat. 1097, 1098, 43 U. S. C. §§161, 162, 165, 173; Act June 3, 1896, c. 312, §2, 29 Stat. 197, 43 U. S. C. §173.)

The bill of complaint and petition for rehearing asserted that the respondent claimed certain rights under the homestead laws but did not possess such rights (R. 66, 70, 72, 89). (Act July 26, 1866, c. 262, §8, 14 Stat. 253, 43 U. S. C. §932.)

The Circuit Court dismissed the complaint (R. 79). This was assigned as error in the Supreme Court of the State (R. 81-82). The Supreme Court affirmed (R. 86-87).

Although the motion to dismiss the complaint (R. 76-78) specified numerous alleged grounds for its dismissal, including the Statute of Limitations (R. 78), non-assignability of the cause of action (R. 78), and ratification of respondent's acts (R. 78), an examination of the complaint discloses these objections to be frivolous, and the first seven alleged objections to the complaint revolved about the question of whether the petitioner or respondent had title to the land under the homestead laws (R. 77).

The opinion of the Supreme Court of Florida upon the prior complaint, reported in 137 Fla. 434, 188 So. 344, and set forth in the Appendix hereto, shows that the frivolous objections advanced were *not* considered by the Florida Court to be ground for dismissal.

The following cases sustain the jurisdiction of this Court:

Seabury v. *Green*, 294 U. S. 165, 168;
Logan v. *Davis*, 232 U. S. 613, 623;
Gauthier v. *Morrison*, 232 U. S. 452, 458;
Graham v. *Gill*, 223 U. S. 643, 644-645.

The questions involved are substantial, since the decision of the Florida Court legalizes the appropriation without compensation of all lands upon which valid entry has been made, if said entry has been canceled through inadvertence or clerical or legal mistake, so long as no patent has been issued.

The Facts.

The facts are stated in the petition (pp. 4-9).

We emphasize the fact that petitioner is possessed of the rights of Pent, who made a valid homestead entry and received a certificate thereon which was erroneously canceled and subsequently ordered reinstated, and that the lands in question were, therefore, not public lands when the respondent appropriated them.

Summary of Argument.

1. The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court, which hold that a homestead entryman whose entry has been erroneously canceled continues to have equitable title.

2. The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a purchaser at a tax sale of land upon which a valid homestead entry has been made acquires a good equitable title.

3. The Supreme Court of Florida, having previously dismissed a *former* complaint solely on the Federal question, to wit, on the ground that no homestead entry was shown, disregarded the valid homestead entry shown by the present complaint and thereby it wrongly decided the Federal question involved.

Argument.

POINT I.

The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a homestead entryman whose entry has been erroneously canceled continues to have equitable title.

The leading case which deals with the effect of the erroneous cancellation of a homestead entry is *Cornelius* v. *Kessel*, 128 U. S. 456. In that case an action was brought in the State Court for the possession of certain lands under a patent. The defendant set up a prior homestead entry by her predecessor in title upon which payment was made and a receipt issued. The Commissioner of the General Land Office erroneously canceled the said entry, and subsequently, and after the date of the plaintiff's patent, the entry was directed to be reinstated.

The facts in the *Cornelius* case are strongly analogous to those in the case at bar. The only apparent difference in the facts is that the claim of the plaintiff in the *Cornelius* case was based upon a patent, whereas the claim of the City of Miami in the case at bar is based upon a general grant of public lands for highways.

However, this difference creates no difference in the principle, since unless land is public land within

the meaning of the homestead laws, it is equally impossible for title to be acquired in it by either a homestead entry or the building of a highway.

This Court in the *Cornelius* case held that the erroneously canceled entry gave a valid, equitable title to the defendant. Mr. Justice Field delivered the opinion of the Court and said at pages 460-461:

> "* * * When the tract, which was subject to entry, was thus purchased and paid for, it ceased to be subject to the disposal of the United States; it was not in equity their property. *Carroll* v. *Safford,* 44 U. S. 3 How. 441, 460 (11:671, 680); *Witherspoon* v. *Duncan,* 71 U. S. 4 Wall. 210, 218 (18:339, 342). The legal title, it is true, was retained by them, but they held it as trustee for the benefit of the purchaser; and they were bound upon proper application to issue to him a patent therefor. If from inadvertence or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title. *Lindsey* v. *Hawes,* 67 U. S. 2 Black, 554 (17:265); *Stark* v. *Starr,* 73 U. S. 6 Wall. 402-419 (18:925-930).
>
> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have pre-

viously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

The opinion further stated at page 463:

"The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner."

Lindsey v. *Hawes*, 67 U. S., 2 Black, 554, cited in the *Cornelius* case, is to the same effect.

Cf.

Sanford v. *Sanford*, 139 U. S. 642.

It is elementary that aside from the question of cancellation which is dealt with in the *Cornelius* case, land upon which a valid entry has been made is not public land, and that the Government cannot dispose of it by highway grant, railroad grant, patent or otherwise.

Hodges v. *Colcord*, 193 U. S. 192;
Hastings & Dakota R. R. v. *Whitney*, 132 U. S. 357.

It is clear that the rights of the petitioner herein stemming from the entry of Pent were not destroyed by the erroneous cancellation of that entry, and that at the time respondent appropriated the lands under the mistaken notion that they were public lands, petitioner's predecessor in title had equitable title to the lands and was entitled to compensation.

The decision of the Florida court is, therefore, in complete conflict with the cases cited above.

POINT II.

The decision of the Supreme Court of the State of Florida is indisputably in conflict with applicable decisions of this Court which hold that a purchaser at a tax sale of land upon which a valid homestead entry has been made acquires a good equitable title.

In 1895 a tax deed from the State of Florida to Frank White covering the land in question was issued on account of non-payment of State and County taxes for the year 1893 (R. 82). Both these dates were after the Pent entry and issuance of Certificate thereon.

In *Carroll* v. *Safford*, 44 U. S., 3 How. 440, after a valid homestead entry and payment had been made, but before patent was issued, taxes were assessed

against certain land, and the land was sold upon the non-payment of taxes.

The bill prayed that the sale be declared void.

The Court held that though the State was prohibited from taxing public lands, the lands in question after entry were not public, and that they were therefore subject to sale for non-payment of taxes.

In *Witherspoon* v. *Duncan*, 71 U. S., 4 Wall. 210, a similar question was involved. The court said at page 219:

> "* * * when the entry is made and certificate given, the particular land is segregated from the mass of public lands and becomes private property. * * * The power to tax exists as soon as the ownership is changed and this is effected when the entry is made on the terms and in the modes allowed by law."

The land in question was subject to taxation under the *Carroll* and *Witherspoon* cases, since in 1893 and 1895,—the dates of the imposition of the tax and the tax sale,—the Pent entry, which had been erroneously canceled because of conflict with the Gleason patent, covered the said land.

Therefore, Frank White acquired a good equitable title to the land upon the tax sale. With this outstanding title the lands could not be considered public lands within the meaning of the highway grant. Consequently, the action of the City of Miami in appropriating such lands without compensation entitled the petitioner to legal redress.

The Supreme Court of Florida in dismissing the bill of complaint herein, necessarily held that the lands in question were public lands in spite of White's tax deed. Its decision was, therefore, in conflict with the *Carroll* and *Witherspoon* cases.

Petitioner is possessed of the rights of Pent, Gleason and White. Petitioner's predecessor in title, Whitten, entered upon the land and made extensive and expensive improvements and occupied it continuously from 1920 until the appropriation by the respondent.

Whatever view may be taken of the facts, it cannot be doubted that the complaint shows that the petitioner's predecessor in title had equitable title to the lands in question under the homestead laws throughout the years 1926 and 1927, when respondent built the highways involved, and that the decision of the Florida Court in holding otherwise conflicts with applicable decisions of this Court.

POINT III.

The Supreme Court of Florida, having previously dismissed a *former* complaint solely on the federal question, to wit, on the ground that no homestead entry was shown, disregarded the valid homestead entry shown by the present complaint and thereby it wrongly decided the federal question involved.

In *City of Miami* v. *The Sirocco Company*, 137 Fla. 434, 188 So. 344, set forth in the Appendix hereto, the Supreme Court of Florida in considering a previous bill of complaint in this action, held that:

> "If Whitten or Wayne Realty & Investment Company (his predecessor in title) had been homestead entryman in regular course or had legally preempted or taken possession of lots one and two, there would be no question of Appellee's equitable title and its right to recover, but so far as the record discloses, Appellee and all its predecessors in title were nothing more than squatters and had acquired no legal status whatever as to the lands in question at the time of the appropriation by the City" (p. 436).

The complaint involved herein contains voluminous allegations showing the source of petitioner's title in Pent's valid homestead entry and the tax deed of Frank White (Petition, pp. 4-8). Nevertheless, the Supreme Court of Florida merely wrote a *per curiam* opinion in which it said nothing about the complaint except that "It seems to the Court that there is no error in the said final decree" (R. 86).

It does not appear that any consideration whatever was given to the allegations in the complaint showing a valid homestead entry. Since obviously no such consideration was given, the Supreme Court of Florida erred greviously and deprived the petitioner of his lawful property without any justification. If the point was considered, it was decided in complete disregard of the applicable decisions of this Court, and the Supreme Court of Florida apparently felt that it was unnecessary to explain the reasoning by which it arrived at its strange and unrighteous decision.

CONCLUSION.

The questions which this application suggest should be definitely settled by this Court. The decision of the Florida Court is in direct conflict with the applicable decisions of this Court. The decision overturns the settled departmental practice of the Department of the Interior and is sure to cause future uncertainty on the question and much litigation. The decision opens the door to the appropriation of private lands without compensation.

Respectfully submitted,

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.

Appendix.

CITY OF MIAMI v. THE SIROCCO COMPANY.

Opinion Filed April 28, 1939.

An appeal from the Circuit Court for Dade County, Paul D. Barns, Judge.

J. W. WATSON, JR., E. F. P. BRIGHAM and W. H. BURWELL, for Appellant;

WALTER O. MARSHBURN, GRADY C. HARRIS and MIDDLETON McDONALD, for Appellee.

TERRELL, *C. J.*—This is a suit in equity to recover the value of lands appropriated for a street or highway by the City of Miami through government lots one and two, Section nineteen, Township Fifty-three, South Range twenty-two East, Dade County. The bill of complaint prays that the City be required to institute condemnation proceedings to determine the value of said lands or that the Court find and fix the amount of compensation plaintiff is entitled to for them and that a lien be decreed against them as security for said amount. A motion to dismiss the bill of complaint was overruled and this appeal was prosecuted from that decree.

The question brought up for determination is whether or not the Sirocco Company is entitled to be compensated for the lands appropriated by the City and this question turns on that of where the title to the lands appropriated was vested at the time of the appropriation. The fact that they were appropriated for the purpose charged is not denied.

The Sirocco Company relies on an equitable lien in and to the lands and the right therein guaranteed to it by Section Twenty-nine, Article Sixteen of the Constitution and Section Twelve of the Bill of Rights, Constitution of Florida, as construed in *Hillsborough County* v. *Kensett*, 107 Fla. 237, 144 So. 393, and *Rosenbaum & Little* v. *State Road Department*, 129 Fla. 723, 177 So. 220. Section Twenty-nine, Article Sixteen of the Constitution requires that lands of private persons be condemned and "full compensation" made therefor under the facts related, if in reality they were owned by complainant.

Appellant contends that the lands appropriated by it were at the time a part of the public domain of the United States and were subject to appropriation for highway and street purposes under Section 2477, United States Revised Statutes, also Section 932, Title 43, Public Lands, U. S. C. A. which provides that "the right of way for the construction of highways over public lands, not reserved for public use, is hereby granted." If this contention is correct, the City had a right to appropriate the lands for its uses.

As to status of the title, the record discloses that on May 28, 1919, Wayne Realty and Investment Company, a Florida Corporation, conveyed the lands in question by warranty deed to Francis S. Whitten, who in turn on June 23, 1925, conveyed them to Manhattan Real Estate Company a Florida Corporation, and that they were on the 27th day of January, 1927, conveyed by the grantee of Whitten to the Sirocco Company, appellee, in this case. Whitten went into possession and made improvements of the lands. The record does not disclose the source of the title of Wayne Realty and Investment Company or any of its grantees.

Litigation ensued over the title and in December, 1931, the Department of the Interior of the United States decided that title to said lands had never passed from the Federal Government, that the Government still owned them, but that on account of Whitten having entered into possession and having improved them, he was entitled to apply for and receive title to them. Whitten on January 2, 1932, accordingly applied for and received title thereto and on March 20, 1933, he conveyed his title, less that to the land appropriated for streets and highways by the City to appellee, the Sirocco Company.

From November, 1925, to sometime in December, 1926, the City appropriated a right of way over lots one and two by the construction of a street or highway and by laying sidewalks, water mains, and sewer pipes thereon. The City therefore appropriated the lands more than six years before Whitten acquired title from the federal government which was in turn conveyed to appellee.

If Whitten or Wayne Realty and Investment Company had been homestead entrymen in regular course or had legally preempted or taken possession of lots one and two, there would be no question of Appellee's equitable title and its right to recover but so far as the record discloses, Appellee and all its predecessors in title were nothing more than squatters and had acquired no legal status whatever as to the lands in question at the time of appropriation by the City.

Whitten's legal title was not acquired until January 2, 1932, more than six years after the City's appropriation. The fact that the Federal Government permitted him to apply for the lands at this time was merely a courtesy which is frequently extended in such cases. It recognizes nothing more than a moral

right. During all these years, Whitten and his successors in title including appellee, stood by and watched the City make its improvements and made no attempt whatever to prevent them or to assert any legal claim in the lands. The streets appropriated now constitute Biscayne Boulevard and the Federal highway, the main thoroughfares into the City from the North.

We have examined every case relied on by Appellee and it appears that the entryman in all of them was in possession or claimed by some legal color of title but in the case at bar, the record does not disclose that appellee or his predecessors claiming adverse to the City had any legal color of title whatever until the Federal government released its right to Whitten in 1932.

It is settled law that after a legal entry is made on the public lands under which the entryman becomes entitled to a patent when the required prerequisites are met, he holds the beneficial or equitable title and the government holds the naked legal title in trust until the issuance of the patent. The entry is the inception of his claim and by it, the lands entered are segregated from the body of the public lands. When so withdrawn, they are no longer subject to entry or preemption or sale until the former entry is cancelled. 22 R. C. L. 260.

In this case, no formal or legal entry was filed or was shown to be of record at the time the City appropriated for streets and highways. Those acquiring title subsequently took subject to the City's claim. *Flint & P. M. Ry. Co.* v. *Gordon,* 41 Mich. 420, 2 N. W. 648; *Keen* v. *Board of Supervisors of Fairview Township,* 8 S. D. 558, 67 N. W. 623; *Duffield* v. *Ashurst,*

12 Ariz. 360, 100 Pac. 820; *Sams* v. *Port Royal & A. Ry. Co.*, 15 S. C. 484.

Other questions argued have been considered but we do not think it necessary to discuss them. If the City's appropriation was an unreasonable one from the standpoint of the amount appropriated or resulted in damage to Appellee's improvements, there may be a basis of recovery to that extent but a reasonable appropriation for right of way purposes was authorized under the federal law and for this there is no right of recovery. The judgment is therefore reversed.

Reversed.

Buford and Thomas, *J. J.*, concur.

Brown, *J.*, concurs in opinion and judgment.

Justices Whitfield and Chapman not participating as authorized by Section 4687 Compiled General Laws of 1927 and Rule 21-A of the Rules of this Court.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

(22)

FILED
SEP 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 517

THE SIROCCO COMPANY
Petitioner,

v.

THE CITY OF MIAMI,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JOHN W. WATSON, Jr.,
Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.....

THE SIROCCO COMPANY
Petitioner,

v.

THE CITY OF MIAMI,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

HISTORY OF THE CASE

This is a suit in equity against the City of Miami seeking to recover the value of lands appropriated for streets and highways of the City of Miami through Government Lot 2, Section 19, Township 53 South, Range 22 East, Dade County, Florida. The lands appropriated now constitute a part of Biscayne Boulevard and the Federal Highway, the main thoroughfares into the city from the north (R. 74).

This cause has been before the Supreme Court of Florida on two occasions. The first opinion was filed

April 28, 1939 (Petition 22-27) styled City of Miami vs. the Sirocco Company, and the second opinion was filed April 1, 1941 (R. 86; rehearing denied, R. 90). On both occasions the Supreme Court of the State of Florida decided the question in the City of Miami's favor.

The City of Miami in 1926 took possession of the lands involved, appropriating them for streets and highway purposes (R. 74). When the City of Miami took possession of the said lands they were the property of the United States government, and not until 1931 was a valid application for a patent filed for them. This valid patent was issued on January 2, 1932, to Francis S. W. Whitten (R. 63). The City had then been in possession for six years.

The petitioner, Sirocco Company, asserts its title to the land by virtue of two warranty deeds from Francis S. Whitten, one dated March 20, 1933 (bottom R. 67) and the second dated March 5, 1938 (R. 73). The first conveyance from Francis S. Whitten to the Sirocco Company specifically **excepted and omitted** the property used and occupied by the City of Miami for street and highway purposes (R. 68). This excepted property is the basis of this action. The second deed was executed more than two years after the date of the filing of the original bill of complaint in 1935 (R. 1), but it included the streets and highways and also specifically assigned to The Sirocco Company any claim that Whitten had against the City of Miami for the taking of said streets and highways. Its execution was twelve years after the City had been in possession of the streets.

SUMMARY OF ARGUMENT

POINT A. The City of Miami had a right to appropriate the land for highway purposes under Section 2477, U. S. Revised Statutes; also 43 U. S. C. A. 932, which provides:

> "The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted."

POINT B. There has been three patents on the land involved; first, the Gleason patent which was reviewed by the Supreme Court of the United States (Gleason v. White, 199 U. S. 54) and this decision swept aside Gleason's claim and held the lands to be public lands; secondly, the Pent patent was cancelled by the Department of Interior (R. 31), and this cancellation was affirmed and recognized by the petitioner's grantor, Whitten, in his motion for rehearing before the Department of Interior (R. 54); the third patent, to Whitten in 1932, is the first and only valid one and is so acknowledged by the petitioner (R. 65, line 32). It was issued more than six years after the City had appropriated the land for street purposes. Therefore the land was public domain when the City made the appropriation in 1925.

POINT C. Francis S. Whitten, or his grantee, Sirocco Company, had allowed the City of Miami to take, use and occupy the land without a demand therefor from 1925 until 1935, when the first bill of complaint was filed (R. 1). This laches would preclude a recovery in equity, as well as creating an estopel by virtue of

Sections 4652 and 4656 of the Compiled General Laws of Florida of 1927, which read as follows:

> **"No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question for seven years before the commencement of such action." (Chapter 1869, Florida Acts of 1872, Section 2).**
>
> **"Where it shall appear that there has been an actual continued occupation for seven years of premises under a claim of title exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied and no other shall be deemed to have been held adversely." (Section 7 of Chapter 1896, Florida Acts of 1872);**

ARGUMENT

The petitioner in its Brief, at page 15 of Petition for Writ of Certiorari, under **"The Facts"** states that it claims under the Pent entry, while in the proceeding before the Secretary of the Interior, Gainesville (Nos. 016724F, JPH, 016857, 018596), the petitioner's grantee, in a motion for re-hearing (R. 54), asked that the ruling of the Commissioner be affirmed, which ruling (R. 31 & 54) held "Pent's entry was legally can-

celled after due procedure and cannot be reinstated * * *."

The position before this Court in these proceedings is directly contrary to the position taken before the Secretary of Interior (R. 54) and contrary to the allegations of the amended bill of complaint (R. 65, line 32) which aver that the Whitten patent was the first valid one.

POINT A. The City of Miami had a right to appropriate the land for highway purposes under Section 2477, U. S. Revised Statutes; also 43 U. S. C. A. 932, which provides:

> **"The right-of-way for the construtcion of highways over public lands not reserved for public uses is hereby granted."**

The Supreme Court of Florida in its first opinion in this cause reported in 137 Fla. 434, 188 Southern 344 (Petition 23-27), held the Bill of Complaint insufficient and that it did not show a right of recovery in the plaintiff. Speaking of the lands involved the Florida Supreme Court said:

> "Litigation ensued over the title, and in December, 1931, the Department of the Interior of the United States decided that title to said lands had never passed from the Federal Government, that the Government still owned them, but that on account of Whitten having entered into possession and having improved them, he was entitled

to apply for and receive title to them. Whitten on January 2, 1932, accordingly applied for and received title thereto, and on March 20, 1933, he conveyed his title, less that to the lands appropriated for streets and highways by the City, to appelee, the Sirocco Company.

"From November, 1925, to sometime in December, 1926, the City appropriated a right of way over lots one and two by the construction of a street or highway and by laying sidewalks, water mains, and sewer pipes thereon. The City therefore appropriated the lands more than six years before Whitten acquired title from the Federal Government which was in turn conveyed to appellee."

Briefly stated, the only difference between the original bill before the Supreme Court of Florida in the case of City of Miami v. The Sirocco Company (supra), and the present amended bill now before the Court, is that in the former there was an omission to show an entryman, and in the latter it affirmatively shows there was no legal entryman prior to the entry of the City. This amended bill affirmatively shows by a positive allegation that the first valid patent was in 1932 (R. 65, line 32), and that exhibits 4 and 5 (R. 53) show the Pent entry has been cancelled and so recognized by Whitten.

The amended bill shows the land was appropriated by the City in 1925 and 1926 for the building of said

streets and highways (R. 27 & 31) and was subject to appropriation for streets and highways (R. 53 & 54).

The Federal Courts have held that this was government land after the entry of the City in 1925 or 1926. In the case of Work v. Read, 10 Fed. (2) at page 637, opinion dated December 7, 1925, we find on page 639:

> "If the claim of Whitten is swept aside, as it must be, and Gleason is confined to the lands originally patented to him, as he must be, the lands in question are concededly public lands of the United States, subject to homestead entry."

> "A careful reading of the opinion discloses that the mistake referred to was the issuance of the Gleason patent under the survey of 1845, instead of the survey of 1875, and the refusal of the department to 'extend the confusion by furnishing patents under the survey of 1875' refers unquestionably to further patents in the way of attempting to correct the mistake made in following the 1845 survey when the Gleason patent was issued."

> * * *

> "It will be observed that this decision completely defines Gleason's rights, and disposes of all further contention as to his title extending beyond the limits of lots 1 and 2, 1845 survey, or lots 3, 4, 6 and 7, 1875 survey. The balance of the land in Section

> 19 remained Government land, and it was so recognized by the Supreme Court in sustaining the patent to the State of Florida for lot 5. The status, therefore, of lots 1 and 2, 1875 survey, was settled by the Supreme Court in its decision, and no longer remains an open question."

Again in the case of **Read v. Work, 32 Federal (2), p. 413,** opinion dated April 1, 1929, we read:

> "With the issue of the Gleason title determined, and the further determination that it is public land, the whole question is thrown open for investigation as if the misapprehension in the Department which led to this litigation had not occurred."

The Department of Interior also held that this was government land until 1931, and allowed Whitten's entry to be filed at that time (R. 52-53).

The Commissioner of the General Land Office, in his opinion, dated Dec. 8, 1930 (R. 31), said:

> "Pent's entry was regularly cancelled after due procedure, and cannot be reinstated in the presence of adverse claim. In view, however, of the subsequent determination by the Supreme Court that lots 1 and 2 were public land, it is the plain duty of the Government to protect a claimant possessed of equities growing out of the Pent entry as against a mere paper applicant. The present record owners of the greater

> portion of lot 2 under title running from Pent will therefore be allowed thirty days from notice hereof within which to apply for said lot under any applicable public land law."

The Commissioner further ruled as follows:

> "Whitten and his assigns are entitled to a preferred right to make entry for Lot 2" (R. 33 No. 4).

This last permission for Whitten to make an entry, given in 1931, shows that there was no entryman recognized by the government at that time, yet the streets had been constructed between 1925 and 1926.

Francis S. Whitten, as will appear from Exhibit No. 5 (R. 53) attached to plaintiff's amendment, and which are made a part of this amended Bill, filed with the Secretary of the Interior a motion for rehearing with reference to Lot 2 according to the survey of 1875.

We quote from the Motion for Rehearing, Plaintiff's Exhibit No. 5 (R. 54), as follows:

> "In view of the fact that Counsel for Whitten in their brief filed in February, 1931, asked that the decision of the Commissioner should be affirmed, and that the Secretary should hold that the Sirocco Company, successor in interest to Whitten, had a preferred right to purchase Lot 2, and in view of the further fact that by exercising

> that preferred right and the perfecting by Whitten of his title to Lot 2, doubts of the validity of this title of Whitten's claimed under Pent's entry and the restoration thereof, would be eliminated, the ruling of the Department should grant to Whitten preferential right to purchase Lot 2 and perfect his title thereto."

The Department of Interior, as is shown from the Plaintiff's Exhibit No. 4 (R. 52) which is made a part of the amended bill, entered an order on the Motion for Rehearing filed by Whitten, and I quote therefrom as follows, to-wit:

> "The Department is of the opinion, after careful consideration of the entire record, that in equity and good conscience Whitten should be allowed to perfect title to said Lot 2 in the exercise of a recognized preference right.
>
> "Movant presents a post-office money order for $7.05, fee and commissions, and a sufficient valid script to take the land based on unused 40.50 acres of a re-certified right of William M. Hazelgrove for 122.50 acres, which, with the certificate of re-certification duly assigned, passed through mesne conveyance to Marty T. Breen, who assigned 40.50 acres thereof on October 26, 1931, to Whitten.
>
> "The governing regulations in the matter of filing former soldier's additional home-

> stead application, posting, publication and submission of non-mineral affidavit, are dispensed with and the Commissioner will direct the local office to place the entry of record by assigning a serial number thereto, to issue final certificate in the name of Francis S. Whitten, and to transmit same by special letter whereupon patent will issue."

It is settled law that the Commissioner of the General Land Office and the officers of the Land Department were created and vested with power to settle controverted questions of fact with reference to the status of the public lands and that such decisions are final.

McGoldrick Lumber Company v. Kinsolving (C. C. A.) 221 F. 819.

Devil's Den Consolidated Oil Co. v. United States (C. C. A.) 251 F. 548.

22 Ruling Case Law 303 and 304.

Thus, it will be seen that the Whitten entry was not made until after the order of the Commissioner just quoted, which is dated December, 1931, and that the land remained public domain until then.

POINT B. There has been three patents on the land involved; first, the Gleason patent which was reviewed by the Supreme Court of the United States (Gleason v. White, 199 U. S. 54) and this decision swept aside

Gleason's claim and held the lands to be public lands; secondly, the Pent patent was cancelled by the Department of Interior (R. 31), and this cancellation was affirmed and recognized by the petitioner's grantor, Whitten, in his motion for rehearing before the Department of Interior (R. 54); the third patent, to Whitten in 1932, is the first and only valid one and is so acknowledged by the petitioner (R. 65, line 32). It was issued more than six years after the City had appropriated the land for street purposes. Therefore the land was public domain when the City made the appropriation in 1925.

The amended bill alleges that Whitten deraigns his title from the Gleason and Pent entries (R. 58). Gleason procured a patent covering Government Lot 2. However, this patent covered Government Lot 2 according to the survey of 1845. There was a later survey in 1875. The government lot 2 of the survey of 1845 did not coincide with government lot 2 according to the survey of 1875, nor does the said government lot 2 according to the survey of 1845 cover any part of government lot 2 according to the survey of 1875. This fact is fully covered and explained in maps printed in the case of **Gleason v. White, 199 U. S. 54.** The Supreme Court of the United States in the case of **Gleason v. White,** supra, as well as the Court of Appeals in and for the District of Columbia in the case of **Work v. Reed, 10 Fed. (2) 637,** held conclusively that Gleason had no right to any part of government lot 2 of the survey of 1875, and that those holding under him did not acquire any right to any portion of government lot 2 according to the survey of 1875.

Therefore, the Sirocco Company cannot make any claim, and I do not understand that it does make claim, to any part of government lot 2 of the survey of 1875 under the Gleason patent, and that is the property involved in the case at bar.

The Pent entry was cancelled and this cancellation was recognized because Francis S. Whitten, as will appear from Exhibit 5 (R. 53), filed with the Secretary of the Interior a motion for re-hearing with reference to government lot 2. In said motion Whitten asked that the Cancellation of the Pent patent be affirmed (R. 54). Those proceedings have been argued supra. The order on said motion for re-hearing by the Department of Interior dated December 22, 1931, eliminated the Pent entry and allowed Whitten to then file his application for patent (R. 52).

The Supreme Court of Florida stated (Petition 25) that to permit Whitten to apply for the land at this time was

> "merely a courtesy which is frequently extended in such cases. It recognizes nothing more than a moral right. * * * * * We have examined every case relied upon by petitioner and it appears that the entryman in all of them was in possession, or claimed by some legal color of title, but in the case at bar, the record does not disclose that the appellee, or his predecessors, claiming adverse to the City, had any legal color of title whatsoever until the Federal Government released its right to Whitten in 1932."

The petitioner accepted these rulings and in the Amended Bill of Complaint (R. 65, line 32) even alleges that the first valid patent was issued to Francis S. Whitten in 1932.

Construing the entire record, including the exhibits to the present amended bill, and in the light of the various Court and Department decisions, it affirmatively appears that the patent was not issued to Whitten on an application based upon any prior actual legal right. Had the Government found that Whitten was entitled to the patent, as an assignee, or grantee, of Pent, then there would have been no need for a new application for the reason that the Pent entry would of itself have been conclusive and the patent would have been issued to Whitten, as assignee of Pent on the Pent entry, without additional application. Whitten, through his counsel, recognized the futility of such a claim and protested the issuance of patent thereon (R. 53), and requested permission to make a new application. The opinion of the Florida Supreme Court was correct in holding that the granting to Whitten of this right to apply for a patent was extended to him merely as a "courtesy" and recognized nothing more than a moral right.

I cannot conceive how, in the face of this record, as presented in the amended bill of complaint, it can be successfully contended that any title in any claimant was recognized by the Federal Government prior to its final order of December, 1931. The fact that the Federal Government required this new application in December, 1931, is self-evident of the denial of the claim of all claimants prior to December, 1931.

POINT C. Francis S. Whitten, or his grantee, Sirocco Company, had allowed the City of Miami to take, use and occupy the land without a demand therefor from 1925 until 1935, when the first bill of complaint was filed (R. 1). This laches would preclude a recovery in equity, as well as creating an estopel by virtue of Sections 4652 and 4656 of the of the Compiled General Laws of Florida, 1927, which read as follows:

> **"No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question for seven years before the commencement of such action." (Chapter 1869, Florida Acts of 1872, Section 2).**
>
> **"Where it shall appear that there has been an actual continued occupation for seven years of premises under a claim of title exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied and no other shall be deemed to have been held adversely." (Section 7 of Chapter 1896, Florida Acts of 1872);**

It appears from the Amended Bill of Complaint that at the time the City of Miami entered into possession of the land the title through which the petitioner claims was then alleged to be in the Manhattan Real Estate Company, a Florida corporation (R. 66). The Manhat-

tan Real Estate Company conveyed this land to petitioner on January 27, 1927, by special warranty deed (R. 67). The Manhattan Real Estate Company and the Sirocco Company at this time realized and **recognized the rights of the City of Miami** as is evidenced by an assignment included in the deed to the plaintiff, the Sirocco Company, in which the Manhattan Real Estate Company attempts to assign (R. 67) to the Sirocco Company all of its rights, title and claim arising by reason of the appropriation of the land by the City. **Although this assignment was dated January 27, 1927, no effort was made by either of these corporations to enforce this right, or any right, or claim against the City of Miami until the filing of the original Bill of Complaint in December, 1935. The City, therefore, held an unquestioned right, possession and title to this land as against both of these corporations from December, 1926, to December, 1935, a period of nine years.**

In considering this matter, it must be borne in mind that Whitten received his patent in January, 1932. That the Sirocco Company, recognizing that it had no title to any of the land, sought and secured from Whitten a warranty deed as the holder of the legal title to the property. Whitten executed this deed in 1933 conveying all of the property except that portion held in the streets here involved (R. 67). Whitten thereby recognized the right and possession of the City to the land which it had taken possession of in 1925, eight years prior to the deed from him to the Sirocco Company, and in specific terms omitted this land from his deed. This deed of Whitten's placed the legal title to all Government Lot 2, except the streets, in the name of the

Sirocco Company. Not until 1938 could the Sirocco Company claim any interest or title against the City, or any land occupied by the City (R. 73), when it obtained its second deed and assignment from Whitten. I respectfully contend that the petitioner is without any right now to maintain this action as an assignee who had no legal title and was not in possession at the time that the entry by the City was made.

CONCLUSION

The record affirmatively shows that the petitioner could not deraign its title from the United States Government until 1932 (Whitten's patent) (R. 65, line 32) so when the City took the lands (using them for arterial highways which have developed petitioner's adjacent property) the taking was an authorized appropriation of the public domain and petitioner's case must fall.

POINTS PRESENTED BY PETITIONER

The first point presented by the petitioner is not applicable because there has been no erroneous cancellation of an entryman, for Francis S. Whitten recognized by affirmative act the cancellation of the Pent patent, and the United States Supreme Court had cancelled the Gleason patent on the lands in question.

Points 2 and 3 of the petitioner are not in accord with the facts at bar for the decision of the Supreme Court of the State of Florida is in direct accord with the United States Supreme Court opinion of **Gleason v. White, 199 U. S. 54.** It is also in conformity with **Section 2477, U. S. Revised Statutes,** the opinions of the

Circuit Court of Appeals in the cases of **Work v. Reed, 10 Fed. (2) 637, Read v. Work 32 Fed. (2) 413,** and the ruilngs of **Department of Interior.**

A perusal of the cases cited by the petitioner disclose that they are not in point with the questions presented in this cause.

A reading of petitioner's citations show the following respective rulings which do not substantiate the granting of a Writ of Certiorari in this cause:

Cornelius v. Kessel, 128 U. S. 456. Involves the rights of an original entryman whose patent was erroneously cancelled, the cancellation in the reported case was contested, in the case before the bar the cancellation was affirmed by request of Whitten and there was no erroneous concellation.

Carroll v. Safford, 44 U. S. 3 How. 441, 460 (11:671,-680). Certain lands had been entered and paid for, but patent had not been issued, the ruling upheld the validity of the State of Michigan taxes assessed against such lands.

Whiterspoon v. Duncan, 71 U. S. 4 Wall. 210, 218 (18: 339, 342). Held that the State had power to tax lands where an entry is made and a certificate given.

Lindsey v. Hawes, 67 U. S., 2 Blod. 554 (17:265). Reversed the cause and adjudicated that one in possession could not be deprived of his patent rights by ex parte administrative proceedings without notice to him.

Stark v. Starr, 73 U. S. 6 Wall. 402-419 (18:925-930). This is a case from the Supreme Court of Oregon. A bill of complaint in equity to quiet title to real estate was dismissed because the plaintiff could not show title in himself.

Sanford v. Sanford, 139 U. S. 642. The plaintiff and defendant filed for and made improvements on separate and adjoining lots. The defendant, unknown to plaintiff, amended his declaration to include plaintiff's tract and had it included with his; the defendant was deemed to be a trustee for plaintiff.

Hodges v. Colcord, 193 U. S. 1929. Holds that an entry void to the entryman himself will preclude others from acquisition of homestead rights.

Hastings & Dakota R. R. v. Whitney, 132 U. S. 359. Held that where a entry was valid on its face homestead rights would attach.

The Supreme Court of Florida in **The City of Miami v. The Sirrocco Company** (supra) makes a pertinent comment when it said (Petition 26):

> **"We have examined every case relied on by appellee and it appears that the entryman in all of them was in possession or claimed by some legal color of title but in the case at bar, the record does not disclose that appellee or his predecessors claiming adverse to the City had any legal color of title whatever until the Federal Government released its right to Whitten in 1932."**

I respectfully urge that the Writ of Certiorari be denied because the petitioner has not shown a meritorious or equitable cause of action, nor does the petition show any constitutional question involved as the appropriation of the lands for highway purposes was authorized by law, they were not the petitioner's property, and it clearly appears that the opinions of the Supreme Court of Florida are in direct accord with the law of the case.

Respectfully submitted,

JOHN W. WATSON, JR.,

Attorney for City of Miami,
Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 517.

THE SIROCCO COMPANY,

Petitioner,

—against—

THE CITY OF MIAMI.

PETITIONER'S REPLY BRIEF.

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

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OCTOBER TERM, 1941.

No. 517.

THE SIROCCO COMPANY,
Petitioner,

v.

THE CITY OF MIAMI.

PETITIONER'S REPLY BRIEF.

The Facts.

The facts are accurately stated in the statement of facts found at pages 4-9 of the petition herein, and it is only necessary to point out that whereas no *patent* was issued covering the lands in question until January 2, 1932, petitioner's rights stem from the valid homestead *entry* made by Pent in 1890 covering all of the lands in question.

On page 2 of respondent's brief it is stated that the petitioner asserts its title by virtue of two warranty deeds from Francis S. Whitten executed in 1933 and 1938 respectively. It should be pointed out that it is clearly alleged in the bill of complaint herein (R. 66, 67) that on June 23, 1925, before the land in question had been appropriated by the respondent, Francis S. Whitten, who was the holder of equitable title from Pent, executed a *warranty* deed to the Manhattan Real Estate Company covering all of the land, which corporation in turn on January 27, 1927 delivered its *warranty* deed to the petitioner covering all of the said land.

POINT I.

Petitioner's rights to the land in question were fixed by the valid entry made by Pent and after the unlawful appropriation of the lands by the respondent no "recognition" of an illegal cancellation of those rights could deprive petitioner of its title to the land.

Much is made in respondent's brief of the fact that after the Department of the Interior had determined that Pent's entry had been unlawfully cancelled and should be reinstated, W. ten asked for a rehearing. Petitioner's rights had already been acquired in 1927 when it received a deed from the Manhattan Real Estate Company which was possessed of all of Whitten's rights by virtue of his 1925 deed to it (R. 66, 67). Whatever Whitten might do thereafter could in no way affect petitioner's title. However, even if the acts of Whitten had been binding upon the petitioner, such acts did not invalidate the equitable title acquired under the Pent entry.

The decision of the Department of the Interior, in modifying the Commissioner's decision which is so heavily relied upon by respondent (Respondent's Brief, pp. 8 and 9) states expressly that:

> "* * * Pent acquired such a title to lot 2, plat of 1875 as would prevent a further disposal of the land by the government to any one other than Pent" (R. 51).

The Department quoted the case of *Cornelius* v. *Kessel*, 128 U. S. 456 to the effect that:

> "* * * By such entry and payment the purchaser secures a vested interest in the property

> and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property" (R. 51).

The decision on rehearing was merely to the effect that a patent would issue directly to Whitten rather than on the valid homestead entry of Pent (R. 52). This in no way affected the validity of petitioner's title through Pent's entry. Any title acquired by Whitten in the land in any fashion had already been conveyed by him with full warranty, to petitioner's predecessor in title, Manhattan Real Estate Company (R. 66, 67).

The conclusive demonstration of the survival of the valid Pent entry through all the subsequent litigation is given in the case of *Cornelius* v. *Kessel*, 128 U. S. 456, quoted on page 18 of petitioner's brief, where the court said at page 463:

> "The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner."

The reinstatement of the Pent entry by the Department of the Interior confirmed petitioner's rights, but petitioner can stand upon the original valid entry.

Considerable reliance is placed in petitioner's brief on the cases of *Work, et al.* v. *Read*, 10 Fed. 2nd 637, 23 Fed. 2nd 139, and *Read* v. *Work*, 32 Fed. 2nd 413.

which contain language to the effect that the lands in question were public. *The most cursory examination of these cases reveals that the Pent claim was not in suit and that the only decision which was made was that the Gleason patent was invalid.*

In *Work, et al.* v. *Read*, 10 Fed. 2nd 637, the court said at page 639 that the claim of Whitten must be swept aside. This applied only to the claim of Whitten under the Gleason patent and had no application to the Pent entry. The land was declared to be public land *as against the claim of Gleason.*

Respondent states at page 8 of its brief that the Department of the Interior held, "that this was government land until 1931", and cites the record at pages 52 and 53 as authority for this proposition. It can only be said that a minute inspection of all parts of the record *fails to reveal* any such holding by the Department.

POINT II.

The fact that no valid patent covering the lands in question was issued until 1932 has no bearing on the equitable title of petitioner and its predecessors dating from 1890 when the Pent entry was made.

It is contended by respondent that the order made on the motion for rehearing before the Department of the Interior in 1932 (R. 52) "eliminated" the Pent entry (Respondent's Brief, p. 13). Petitioner categorically denies this and the reasons for the denial are given in Point I above.

Respondent goes on to say that if Whitten had been entitled to a patent as grantee of Pent, he need not have made a new application. The fact that he did

make an application for a patent is taken by respondent to be a "recognition of the futility of such a claim" (Respondent's Brief, p. 14).

Petitioner insists that it is immaterial why such application was made. Nevertheless, an examination of the record which reveals why such application was made may set to rest any doubts raised by respondent's contention. The conveyances of Pent and his wife under which petitioner's claims to the land in question arise, cover only 31.10 acres of the 40.50 acres in lot 2 (R. 31). It was therefore felt that a patent should issue to Whitten rather than to Pent, so that doubts as to the validity of his title on the remaining 9.40 acres should be set at rest. *No part of the land in suit is contained in the 9.40 acres for which deeds from Pent are missing, and therefore the rehearing in no way affects the case at bar.*

The issuance of a patent directly to Whitten was entirely his own idea and was not required by the federal government. His equitable title had already been transferred to petitioner. His subsequent conveyances at most finally transferred the legal title to petitioner.

POINT III.

The right of way over the lands in question has not been acquired by the respondent by prescription or adverse possession and petitioner is not guilty of laches.

Respondent quotes two sections of the Florida law in an effort to establish that the statute of limitations on petitioner's claim has run, and that a right of way over the land in question has been acquired by the respondent by adverse possession.

Additional citation of the law of Florida will serve to dispose of these claims.

Section 4652 of the Compiled General Laws of Florida 1927 cited by the respondent (Respondent's Brief, p. 15) actually reads as follows:

> "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question *within* seven years before the commencement of such action" (Florida Acts of 1872, c. 1869, §2).

Section 4653 of the same compilation of laws, the next section, reads as follows:

> "No cause of action or defense to an action founded upon the title to real property or to rents or to service out of the same shall be effectual unless it appear that the person prosecuting the action, or making the defense or under whose title the action is prosecuted or the defense is made or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within seven years before the accruing of the right of action or defense in respect of which such action is prosecuted or defense made, *or unless it appear that the title to such premises was derived from the United States or the State of Florida, within seven years before the commencement of such action; and the period of limitation shall not begin to run until the passage of the title from the State or the United States*" (Florida Acts of 1872, c. 1869, §3). (Italics added.)

This statute indicates that so long as legal title remains in the United States, no title can be acquired by adverse possession, and the cases are in accord with this interpretation.

In the case of *Hagan* v. *Ellis*, 39 Fla. 463, 22 So. 727, it was held that where an entry was made in 1854 and patent was not issued until 1891, title to the property could not be acquired as against the entryman in the interim period by adverse possession, since title remained in the United States.

This Honorable Court, in *Redfield* v. *Parks*, 132 U. S. 239, held that while the legal title to land remained in the United States, the statute of limitations did not run.

But there is a further reason why respondent has acquired no right of way over the lands in question. It is well settled in Florida that a right of way by prescription can only be acquired by twenty years' use and occupation, and that the seven year period applicable to title to real estate is not controlling.

In *Vereen & Sons, Inc.* v. *Houser*, 123 Fla. 641, 167 So. 45, the court said at page 648:

> "* * * While title to real estate may be acquired by the exercise of actual, exclusive adverse and continued possession for a period of seven (7) years under color of title under our statute, that period of limitation cannot be held to apply to the acquisition by prescription of an easement * * *."

The case of *Zetrouer* v. *Zetrouer*, 89 Fla. 253, 103 So. 625; 95 Fla. 976, 117 So. 383, held that land for a street might be acquired by prescription in Florida,

but that a twenty year period was required. This decision was followed in *Dade County* v. *Snyder*, 140 Fla. 135, 191 So. 185.

See also *Couture* v. *County of Dade*, 93 Fla. 342, 353, 112 So. 75, 79.

It is apparent from the foregoing that respondent's contention that it obtained a right of way by adverse possession is without merit.

Respondent's final contention is that petitioner has slept on its rights and "recognized" the rights of the respondent. In answer to this contention, it may be noted that the bill of complaint alleges that *respondent was fully aware that the land in question was private property at the time when it unlawfully appropriated it* (R. 70, 72). It is further alleged that petitioner could not fence off or obstruct the land in question to prevent its occupation and use by respondent (R. 74).

Respondent was aware of petitioner's claim of title, and proceeded to build the roads in question in defiance of that claim. Petitioner did nothing to give the respondent the impression that the land had been dedicated to the City of Miami. Once the roads had been built, the fact that petitioner did not commence suit until after its rights had been finally established before the Department of the Interior in no way damaged respondent.

No action was taken by respondent in reliance upon petitioner's inactivity, so the doctrine of laches has no application whatsoever.

All of the contentions now raised by the respondent were raised before the Supreme Court of Florida on

the previous appeal, and the court did not consider that there was sufficient merit in them to find them worthy of discussion (Petitioner's Brief, p. 27). In fact the court stated that:

> "* * * If Whitten or Wayne Realty & Investment Company had been homestead entrymen in legal course, or had legally preempted or taken possession of lots 1 and 2, there would be no question of Appellee's equitable title and its right to recover * * *" (Petitioner's Brief, p. 25).

The case was therefore decided solely upon the Federal ground, and while the Supreme Court of Florida, in considering the amended bill of complaint on the appeal herein involved, wrote no opinion, it is unreasonable to assume that its decision was based upon grounds which it rejected on the previous appeal.

CONCLUSION.

The respondent's brief is an attempt to raise collateral issues and to go into what it considers to be the merits of the case at bar. It does not in any way meet the contentions of the petition:

That this court has jurisdiction of the action;

That a substantial federal question is involved;

That the decision of the Supreme Court of the State of Florida is in direct conflict with applicable decisions of this court.

For these reasons it is respectfully submitted that the petition should be granted.

SOL. A. ROSENBLATT,
Counsel for Petitioner.

SOL. A. ROSENBLATT,
JOSHUA BIXION CAHN,
Of Counsel.

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FILED
NOV 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

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OCTOBER TERM, 1941.

No. 517.

THE SIROCCO COMPANY,

Petitioner,

v.

THE CITY OF MIAMI.

PETITION FOR REHEARING.

SOL A. ROSENBLATT,
Counsel for Petitioner.

SOL A. ROSENBLATT,
JOSHUA BINION CAHN,
Of Counsel.

THE COURT PRESS, N. Y. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 517.

THE SIROCCO COMPANY,
Petitioner,

v.

THE CITY OF MIAMI.

Petition for Rehearing.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Sirocco Company, by its counsel, Sol A. Rosenblatt, prays that a rehearing on its petition for a writ of certiorari to review the judgment of the Supreme Court of Florida in the above entitled cause be granted.

The denial of the petition for a writ of certiorari herein leaves the petitioner entirely without remedy against the unlawful appropriation of its property by the respondent without any shadow of justification or any compensation of whatsoever nature.

The petitioner has what should be established to be a completely valid and enforceable title to five acres of land in Miami, Florida, which land was seized by

the respondent and used to build roads thereon in complete defiance of petitioner's property rights.

The petitioner has sought in every manner made available to it by the law to recover from the respondent the value of the land in question. Respondent has utterly failed and refused to make any payment whatsoever for the land thus appropriated.

The petitioner sought to establish its rights in the Florida Courts. Because of the failure of those Courts properly to interpret the law, the bill of complaint was dismissed.

After vainly seeking a rehearing upon the erroneous decision of the Florida Court, the petitioner petitioned to this Court for a writ of certiorari so that the unlawful and erroneous decision of the Supreme Court of Florida could be corrected.

The property rights involved herein are substantial. The land in question when unlawfully appropriated was worth well in excess of one hundred fifty thousand dollars per acre, and interest on the value of petitioner's property brings the amount of its claim to approximately a million and a half dollars.

An examination of the petition and brief in support thereof discloses that the action of the Florida Court was completely without legal basis, and that such action confiscated petitioner's lands without any color of right and deprived it of its lawful property without any compensation.

As is pointed out in the petition and brief, the decision of the Florida Court is in direct conflict with the applicable decisions of this Court. Such decision is in nowise reconcilable with the well-established practice of the Department of the Interior and the rulings of that Department under the very facts here in question.

For the foregoing reasons petitioner respectfully urges that this petition for rehearing be granted; that the judgment of this Court denying the application of petitioner for a writ of certiorari, be upon further consideration set aside, and that the petition for certiorari be granted.

Respectfully submitted,

THE SIROCCO COMPANY,
By SOL. A. ROSENBLATT,
Counsel for Petitioner.

State of New York,
City of New York,
County of New York—ss.:

SOL. A. ROSENBLATT, being duly duly sworn, deposes and says that he is the counsel for The Sirocco Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by The Sirocco Company is because the said petitioner is a Florida corporation, and deponent is its counsel.

SOL. A. ROSENBLATT.

Sworn to before me this
3rd day of November, 1941.

MARTHA POSNER,
Notary Public,
New York County.

Certificate of Counsel.

I, SOL A. ROSENBLATT, Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

SOL A. ROSENBLATT,
Counsel for Petitioner.